IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. .....

MILTON E. SPRINGER, DALMACIO COSTAS and ANSELMO HILARIO,
Petitioners,

VERSUS

THE GOVERNMENT OF THE PHILIPPINE ISLANDS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE PETITIONERS

This is a petition for a writ of certiorari under section 7 of the Act of February 13, 1925, 43 Stat. at L. 940, Fed. Stat. Anno. Supp. 1925, p. 90, which gave jurisdiction to this Honorable Court to examine by certiorari the final judgments and decrees of the Supreme Court of the Philippine Islands in all cases in which the Constitution or any statute, treaty, title, or privilege of the United States was involved, or in causes in which the value in controversy exceeded $25,000.00. By section 8 of the act

application for the writ is required to be made within six months after the entry of the judgment or decree sought to be reviewed. The judgment of the Supreme Court of the Philippine Islands involved in this petition was entered April 11, 1927 (R. 212).

It is urged that a writ of certiorari should issue for the reason that this cause involves a question of the most vital importance arising under a statute of the United States, to wit, the Philippine Autonomy Act, Chap. 416, 39 Stat. at L. 545, Fed. Stat. Anno. Supp. 1918, p. 592; Yu Kong Eng v. Trinidad, 271 U. S. 500, 70 L. ed. 1059; Alejandrino v. Quezon, 271 U. S. 528, 70 L. ed. 1071; Wright v. Ynchausti & Co., 71 (U. S.) L. ed. (Adv. 267); and Posadas v. City of Manila, No. 363, decided May 31, 1927.

OPINION OF THE COURT BELOW

The opinion of Mr. Justice Malcolm of the court below was concurred in by Justices Street, Ostrand, Johns, and Romualdez (R. 69-113). Mr. Justice Johnson filed a separate concurring opinion (R. 114-177), while Chief Justice Avanceña and Justices Villamor and Villa-Real joined in filing a dissenting opinion (R. 178-202).

In reaching the conclusion that section 4 of Act No. 2705, as amended by Act No. 2822, of the Philippine Legislature, was invalid in so far as it pur-

ported to vest the voting power of the stock of the Philippine Government in the National Coal Company in a committee consisting of the Governor-General, the President of the Senate, and the Speaker of the House of Representatives, both Mr. Justice Malcolm and Mr. Justice Johnson proceeded on the theory that membership of the committee mentioned was an office within the purview of the Philippine Autonomy Act, and that the power to vote the stock of the Philippine Government in the National Coal Company was an executive function of government vested exclusively in the Governor-General by the Philippine Autonomy Act.

THE QUESTIONS OF LAW

The questions of law presented and the propositions on which the petitioners rely are:

I. Membership of the committee created by section 4 of Act No. 2705 of the Philippine Legislature is not an office within the purview of the Philippine Autonomy Act.

II. The power to vote the stock of the Philippine Government in the National Coal Company is not an executive function of government.

III. The Philippine Legislature had authority to prescribe the method of voting the stock of the Philippine Government in the National Coal Company.

IV. The Philippine Legislature has all general legislative power such as is exercised by States and Territories.

V. The grant of general legislative power to the Philippine Legislature included the authority to create certain offices and to designate the persons to fill such offices.

VI. Act No. 2705 of the Philippine Legislature has received the implied sanction of Congress.

VII. The Governor-General had no authority to exercise solely the voting power of the stock of the Philippine Government in the National Coal Company.

ARGUMENT

I

Membership of the committee created by section 4 of Act No. 2705 of the Philippine Legislature is not an office within the purview of the Philippine Autonomy Act.

In determining what is and what is not an office within the meaning of the Philippine Autonomy Act, there would seem to be no better criterion than the practice of Congress in the premises, for it goes without saying that Congress is the best interpreter of its own enactments. In construing certain provisions of the United States Constitution which are similar to the provisions of the Philippine Autonomy Act governing this branch of the case, Congress had

taken the view that "the regents and directors and consulting trustees to the various public institutions in the District of Columbia and appointed by the Speaker of the House, are not, nor are any of them, officers under the United States within the meaning of the Constitution." One of the public institutions thus mentioned is the Smithsonian Institution, which, because of its important bearing on the instant case, will be presently noticed.

In incorporating the Smithsonian Institution, Congress had provided for its management "by a Board of Regents, named the Regents of the Smithsonian Institution, to be composed of the Vice-President, the Chief Justice of the United States, and three members of the Senate and three members of the House of Representatives; together with six other persons, other than members of Congress, two of whom shall be resident in the city of Washington; and the other four shall be inhabitants of some State, but no two of them of the same State." (9 Fed. Stat. Anno., Sec. 5580.) The act incorporating the Institution also provides that: "The regents to be selected shall be appointed as follows: The members of the Senate by the President thereof; the members of the House by the Speaker thereof; and the six other persons by joint resolution of the Senate and House of Representatives. The members of the House so appointed shall serve for the

term of two years; and on every alternate fourth Wednesday of December a like number shall be appointed in the same manner, to serve until the fourth Wednesday in December, in the second year succeeding their appointment. The Senators so appointed shall serve during the term for which they shall hold, without re-election, their office as Senators. Vacancies occasioned by death, resignation, or otherwise, shall be filled as vacancies in committees are filled. The regular term of service for the other six members shall be six years; and new elections thereof shall be made by joint resolutions of Congress. Vacancies occasioned by death, resignation, or otherwise may be filled in like manner by joint resolution of Congress." (Ibid, Sec. 5581.)

In a carefully prepared report submitted by the Committee on the Judiciary of the House of Representatives, the said committee discussed at length the meaning of the term "public office" and quoted with approval the following authorities:

> "A public office is the right, authority, and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public. Mechem's Public Offices and Officers, section 1; Matter of Hathaway, 71 N. Y., 233-243; 3 Greenleaf (Me.), 481; Public Officers,

Throop, sec. 6; Olmstead v. The Mayor, etc., 42 N. Y. Sup Ct., 481.)

"Office involves delegation of sovereign functions. The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer." (Mechem's Pub. Offices, sec. 4.)

"It (public office) implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office; and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office." (3 Greenleaf (Me.) 481; Mechem's Pub. Offices, etc., sec. 2; Olmstead v. The Mayor, 42 N. Y. Sup. Ct., 481; Public Officers, Throop, sec. 6.)

"The officer is distinguished from the employee," says Judge Cooley, "in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, although not necessarily, in the tenure of his position."

The committee also referred to the case of United States v. Germaine, 99 U. S. 508, in which the question of who was or who was not a public officer was discussed, and the court said:

> "If we look to the nature of defendant's employment we think it equally clear that he is not an officer. In that case (referring to United States v. Hartwell) the court said, the term embraces the ideas of tenure, duration, emolument, and duties and that the latter were continuing and permanent, not occasional or temporary. In the case before us, the duties are not continuing and permanent, and they are occasional and intermittent. * * * He is required to keep no place of business for the public use. He gives no bond, and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised. * * * He is but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. * * * There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case."

Another case cited by the committee was that of McArthur v. Nelson, 81 Ky. 67, in which the court, being called upon to consider whether certain commissioners were district officers, said:

> "The first section of the act authorizes the judge of the circuit court to appoint three commissioners, residents of the district, who shall hold their office at the will and pleasure of the judge. It is made the duty of the commissioners to have the court-house constructed at a cost not exceeding $50,000, and to enable them to raise this money, they are authorized to issue bonds, with coupons attached, bearing interest at 5 per cent, payable semi-anually; and, to redeem the bonds and pay the interest, they are further empowered to levy an annual tax on the

> real and personal property in the district not exceeding 12 cents on the $100, etc. * * * They are not district officers within the meaning of section 10 of article 6 of the constitution, but are the mere agents for the district, required by the act to discharge certain duties with reference to the building of the courthouse, and when those duties end their employment terminates."

Basing its conclusion on the foregoing authorities, the committee said:

> "In respect to visitors to the Military Academy etc., the committee finds that those members of the House of Representatives appointed and designated as visitors to the Military Academy at West Point, to the Naval Academy at Annapolis, and the regents and directors and consulting trustees to the various public institutions in the District of Columbia and appointed by the Speaker of the House, are not, nor are any of them, officers under the United States within the meaning of the Constitution." (House Report No. 2205, 55th Congress, 3rd Session—House Reports, Vol. 2.)

In United States v. Hatch, 1 Pin. 182 (cited in 45 Am. Dig. Cent. ed. p. 2947), the court held that: "The organic law of the territory of Wisconsin (Act Cong. April 20, 1836), providing for the appointment of all civil officers by the executive, embraces only those officers in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations or the control of the general interests of society is confided, and does not include such officers as canal commissioners."

In Sheboygan v. Parker, 3 Wall. 93, 18 L. ed. 33, an act of the Legislature of Wisconsin authorized the county of Sheboygan to aid in the construction of a certain railroad by becoming a stockholder in the company. The act named certain persons who were to become the agents of the county to subscribe on its behalf for stock and issue its bonds in payment, provided the people of the county should so determine at an election to be held as therein provided. The election was held; a majority of the votes were in favor of issuing the bonds under the act, and the bonds were thereupon issued and delivered by the county to the company, in payment for stock subscribed according to the act. In an action to recover the amount of certain interest coupons attached to the bonds, the county set up in defense, that the act authorizing the county to subscribe for stock and issue its bonds was unconstitutional, because it appointed officers to act for the county while, it was alleged, the constitution required all county officers to be elected by the people or appointed by the board of supervisors. In deciding the case, this Honorable Court said:

> "The defendant below objected that this act was unconstitutional and void, because 'the legislature, in and by said act, assumed to appoint five persons therein named, and to clothe them with the power of county officers, contrary to the Constitution of the state,' which provides that 'all county of-

ficers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of the respective counties, or appointed by the board of supervisors, as the legislature shall direct.'

"The commissioners or board of supervisors of a county, in the exercise of their general powers as such, have no authority to subscribe stock to railroads, and bind the people of the county to pay bonds issued for that purpose without special authority conferred upon them by the legislature. But when special authority is given to the people of a county to do these acts, and bind themselves by the issue of such bonds, the legislature may properly direct the mode in which it shall be effected. The persons specially appointed to act as agents for the people have a ministerial duty to perform in issuing the bonds, after the people, at an election held for the purpose, have assented that they shall be bound.

"Such persons, in performance of their special duty are in no proper sense 'county officers.' They do not exercise any of the political functions of county officers, such as levying taxes & c. They do not exercise continuously, and as a part of the regular and permanent administration of the government, any important public powers, trusts, or duties.' State v. Kennon, 7 Ohio St. 562."

It will be noticed from a review of the authorities above cited that the most important characteristic of a public office is that "it involves a delegation of a portion of the sovereign functions of government to the person filling the office." The term "public office" also embraces the ideas of tenure, duration, emolument, and duties, and that the latter

are continuing and permanent, not occasional or temporary. Considered in this light, can it be successfully maintained that membership of the committee created by section 4 of Act No. 2705 involves a delegation of a portion of the sovereign functions of government to the person holding such membership? In other words, can it be reasonably contended that the exercise of the right of a stockholder in a private corporation is a portion of the sovereign functions of government? Laying aside the fact that membership of the said committee carries no emolument, can it be said that the duties incident to such membership are continuing and permanent, not occasional or temporary?

That membership of the committee created by section 4 of Act No. 2705 is wholly lacking in the essential elements of a public office, seems too clear to require any further discussion.

II

The power to vote the stock of the Philippine Government in the National Coal Company is not an executive function of government.

The argument advanced against the constitutionality of section 4 of Act No. 2705, is based upon a fundamentally erroneous conception of the nature of the voting power conferred on the committee created thereby. Those who attack the constitutionality of that legal provision proceed on the theory

that the power to vote the stock of the Philippine Government in the National Coal Company is in the nature of an executive function of government vested exclusively in the Governor-General by the Philippine Autonomy Act. Herein lies the fallacy of their argument. Ownership of stock in a corporation is property. In exercising its right of ownership of stock in the National Coal Company, the government acts not in its sovereign, governmental capacity, but in its proprietary, private capacity. Consequently, the principle of the division of governmental powers does not apply. This is the idea underlying the decisions in the best considered cases on the subject.

In the leading case of The Bank of the United States v. The Planters' Bank of Georgia, 9 Wheat. 904, 6 L. ed. 244, 245, this Honorable Court, by Mr. Chief Justice Marshall, said:

> "It is, we think a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union who have an interest in banks, are not suable

> even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act."

In Curran v. The State of Arkansas, 15 How. 304, 14 L. ed. 705, 708, which was a suit against a corporation in which the State was the only stockholder, the court said:

> "And first, as to the character of the parties. By the charter of this Bank, the State of Arkansas became its sole stockholder. But the Bank was a distinct trading corporation, having a complete separate existence, enabled to enter into valid contracts binding itself alone, and having a specific capital stock, provided, and held out to the public as the means to pay its debts. The obligations of its contracts, the funds provided for their performance and the equitable rights of its creditors were in no way affected by the fact that a sovereign state paid in its capital, and consequently became entitled to its profits. When paid in and vested in the corporation, the capital stock became chargeable at once with the trust, and subject to the uses declared and fixed by the charter, to the same extent, and for the same reasons, as it would have been if contributed by private persons.

"That a state, by becoming interested with others in a banking corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives, that it lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege in respect to those transactions not derived from the charter, has been repeatedly affirmed by this court in The Bank of the United States v. The Planters' Bank, 9 Wheat. 904; Bank of Kentucky v. Wistar et al, 3 Pet. 431; Briscoe v. The Bank of Kentucky, 11 Id. 324; Darrington et al v. The Bank of Alabama, 13 How. 12. And our opinion is, that the fact that the capital stock of this corporation came from the State which was solely interested in the profits of the business, does not affect the complainant's right, as a creditor, to be paid out of its property, a right which, as we have seen, follows the fund into the hands of every person, save a *bona fide* creditor or purchaser, and which a court of equity is bound to enforce by its decree against any party except such a creditor or purchaser capable by law of being brought within its jurisdiction."

The Supreme Court of North Carolina, in Marshall v. Railroad Co., 92 N. C. 322, declared:

"When the state is a stockholder in a railroad company, it is bound by the provisions of the charter, in the same manner as an individual stockholder. It has no advantage as a stockholder on account of its sovereignty; for by becoming such it lays down

> its character as a sovereign and places itself on a footing of equality with the individual stockholders."

Finally, in National Coal Company v. Collector of Internal Revenue, 46 Philippine 583, the Supreme Court of the Philippine Islands held that the National Coal Company is a private corporation; that the fact that the Government happens to be a stockholder therein does not make it a public corporation; and that as a private corporation it has no greater rights, powers or privileges than any other corporation which might be organized for the same purpose under the Corporation Law. In rendering the opinion of the court, Mr. Justice Johnson said:

> "The plaintiff is a private corporation. The mere fact that the Government happens to be a majority stockholder does not make it a public corporation. Act No. 2705, as amended by Act No. 2822, makes it subject to all of the provisions of the Corporation Law, in so far as they are not inconsistent with said Act (No. 2705). No provisions of Act No. 2705 are found to be inconsistent with the provisions of the Corporation Law. As a private corporation, it has no greater rights, powers or privileges than any other corporation which might be organized for the same purpose under the Corporation Law, and certainly it was not the intention of the Legislature to give it a preference or right or privilege over other legitimate private corporations in the mining of coal."

III

The Philippine Legislature had authority to prescribe the method of voting the stock of the Philippine Government in the National Coal Company.

It may be said that this authority was derived from three sources, namely: (1) the power to create corporations and to provide for their organization and management, (2) the power to appropriate public funds for the purpose of buying stock in the company, and (3) the power to provide for voting by proxy on shares of stock in private corporations.

(1) *The power to create corporations and to provide for their organization and management.* To avoid confusion in the discussion of this point, it is important to bear in mind the nature and scope of Act No. 2705, as amended. This statute is the charter of the National Coal Company. It was enacted by the Philippine Legislature in the exercise of its acknowledged authority to create corporations and to provide for their organization and management. The power to prescribe the method of voting the stock in a corporation is an incident of the power to provide for the organization and management of such corporation. It results, therefore, that it was within the power of the Legislature to provide, under Section 4 of Act No. 2705 that the voting power of the stock of the Philippine Government in the National Coal Company shall be vest-

ed exclusively in a committee consisting of the Governor-General, the President of the Senate, and the Speaker of the House of Representatives.

This view of the power of the legislature to provide for the organization and management of corporations or institutions created or established by it finds authoritative confirmation both in (a) federal and (b) local legislation. The following are a few of the instances which may be cited:

A. FEDERAL LEGISLATION

The Smithsonian Institution. The organization and management of this institution has already been noticed in another part of this brief. (See pp. 5-6.)

The National Home for Disabled Volunteer Soldiers. "Very shortly after the close of the Civil War the Congress provided for the incorporation of a perpetual establishment for the care and relief of disabled volunteers of the United States Army, as the National Home for Disabled Volunteer Soldiers. The President, the Secretary of War, the Chief Justice, and such persons as may be associated with them, are constituted as the corporation, to have perpetual succession, and with all corporate powers and responsibilities. The main establishment of the home was located at Dayton, Ohio, and branches have been established at Togus, Maine;

Milwaukee, Wisconsin; Hampden, Virginia; Marion, Indiana; Leavenworth, Kansas; Santa Monica, California; and Danville, Illinois." (Gauss, The American Government, pp. 866-867.)

The National Forest Reservation Commission. In creating the National Forest Reservation Commission, Congress provided as follows: "That a commission, to be known as the National Forest Reservation Commission, consisting of the Secretary of War, the Secretary of the Interior, the Secretary of Agriculture, and two members of the Senate, to be selected by the President of the Senate, and two members of the House of Representatives, to be selected by the Speaker, is hereby created and authorized to consider and pass upon such lands as may be recommended for purchase as provided in section six of this Act, and to fix the price or prices at which such lands may be purchased, and no purchases shall be made of any lands until such lands have been duly approved for purchase by said commission: *Provided*, That the members of the commission herein created shall serve as such only during their incumbency in their respective official positions, and any vacancy on the commission shall be filled in the manner as the original appointment." (36 Stat. at L. 962; 9 Fed. Stat. Anno., p. 598.)

The Public Buildings Commission. The Act of Congress of March 1, 1919, creating a public build-

ings commission provided: "With a view to the control and allotment of space in owned or leased Government buildings in the District of Columbia, a Public Buildings Commission is hereby created to be composed of two Senators to be appointed by the President of the Senate and two members of the House of Representatives to be appointed by the Speaker who shall serve thereon only so long as they are Members of Congress, and the Superintendent of the Capitol Building and Grounds, the officer in charge of public buildings and grounds, and the Supervising Architect or the Acting Supervising Architect of the Treasury during any vacancy in said office. Said commission shall elect one of its members as chairman of the commission and is authorized to employ such expert clerical or other services as it may deem necessary." (Fed. Stat. Anno. Supp. 1919, p. 335.)

B. LOCAL LEGISLATION

The Board of Trustees of the College of San José. Act No. 69 of the Philippine Commission provided for a board of trustees to conduct the College of San José as a school of medicine and pharmacy, as follows: "SECTION 1. T. H. Pardo de Tavera, M. D., Charles R. Greenleaf, M. D., Colonel and Chief Surgeon of the Division of the Philippines in the United States Army, Leon M. Guerrero, Manuel Gomez Martinez, M. D., and Frank S. Bourns, M. D.,

are hereby constituted a board of trustees to take possession of and manage the property and estates of the College of San José, of the City of Manila, to maintain and conduct in the buildings of said college a school of medicine and pharmacy for the benefit of the qualified members of the public of the Philippine Islands, with power to determine the number of professorial chairs to be established, the number of instructors and demonstrators needed, to appoint professors constituting the faculty, to appoint the necessary instructors and demonstrators and other necessary officers and employees, to fix the curriculum, to fix reasonable tuition and other fees to be collected from the students, to determine the period of study necessary for the conferring of the degrees of Doctor of Medicine and Doctor of Pharmacy, and to take any other steps needed in the creation and maintenance of an efficient school of medicine and pharmacy for the Philippine people." Public Laws Enacted by the Philippine Commission, vol. 1, p. 93.

The Board of Control of the Medical School. Act No. 1415 of the Philippine Commission was an act entitled "An Act Establishing a Medical School and Defining the Manner in Which it Shall be Controlled and Conducted", and section 2 thereof provided as follows: "The powers of the corporation until reincorporated as above provided are hereby vested in a body to be known as the 'board of control of the

Philippine Medical School,' which shall consist of the Secretary of Public Instruction, the Secretary of the Interior, one member of the Philippine Commission, and one other member to be designated by the Governor-General. The dean of the faculty of the school, after the establishment of said faculty, also shall be a member of the board of control." Public Laws Enacted by the Philippine Commission, vol. 5, p. 102.

The Capitol Building Committee. Act No. 1841 of the Philippine Legislature provided for the construction of the capitol of the Philippine Islands and created a committee to prepare plans therefor, as follows: "SECTION 2. A committee is hereby created for the purpose of preparing plans for such capitol building or buildings, which committee shall be composed of seven members, three to be appointed by the President of the Commission, three to be appointed by the Speaker of the Assembly, and the seventh to be the Consulting Architect." Public Laws Enacted by the Philippine Legislature, vol. 7, p. 41.

The Philippine Public Library Committee. Act No. 1849 of the Philippine Legislature provided for the establishment of a public library, and section 2 thereof contained the following proviso: "A committee of three, to be known as 'The Philippine Public Library Committee,' shall be appointed by the

Governor-General and the Speaker of the Assembly and shall collect, select for purchase, and purchase, out of the funds appropriated by this Act, such books, papers, documents and periodicals relating to the Philippines and to the history thereof, and such other books, papers, documents, and periodicals, as to said committee may seem proper for the establishment and the uses and purposes of the Philippine Public Library. It shall be the duty of said committee to make a careful investigation of all books, papers, documents, and periodicals now in the hands of the Government relating to the Philippines and to the history thereof, and to make due report of its investigations to the Governor-General, who, upon the recommendations of said committee, may direct the transfer of all said books, papers, documents, and periodicals not required for official purposes to the Philippine Public Library upon the appointment of the librarian provided for by this Act." Public Laws Enacted by the Philippine Legislature, vol. 7, p. 53.

The Board of Regents of the University of the Philippines. Act No. 1870 of the Philippine Legislature provided for the establishment of the University of the Philippines and for its management by a board of regents composed of "the Secretary of Public Instruction, the Director of Education, the chairman of the Committee of Public Instruction of the Philippine Assembly, the president of the

university, and five additional members to be appointed by the Governor-General, by and with the advice and consent of the Philippine Commission. The president of the university shall be selected and his compensation shall be fixed by the Board of Regents, of which board he shall be *ex officio* chairman." Public Laws Enacted by the Philippine Legislature, vol. 7, p. 76.

The Sibul Sanitarium Committee. Act No. 1981 of the Philippine Legislature provided for the establishment of a sanitarium at Sibul, San Miguel de Mayumo, province of Bulacan, and section 4 thereof provided among other things: "A committee is hereby created, to be composed of Donato Teodoro, provincial governor of Bulacan; Hugh Redmond, district engineer; Miguel Siojo, municipal president of San Miguel de Mayumo, Province of Bulacan; and two other members appointed by the Governor-General, to make, subject to the approval of the Governor-General, the aforesaid improvements and such others as they may deem advisable." Public Laws Enacted by the Philippine Legislature, vol. 8, p. 20.

The Philippine Exposition Board. Act No. 2023 of the Philippine Legislature provided for an exposition of Philippine products in the city of Manila, and section 2 thereof provided as follows: "This exposition shall be under the direction and control

of a board of directors, which shall be known as the Philippine Exposition Board and composed of the Secretary of Commerce and Police, who shall be the president thereof; the chairman of the Committee on Industry and Commerce of the Philippine Assembly, who shall be the vice-president; and three members who shall be appointed by the Governor-General. Of the members appointed by the Governor-General, one shall be a member of the Philippine Chamber of Commerce and another a member of the Manila Merchants' Association." Public Laws Enacted by the Philippine Legislature, vol. 8, p. 109.

The Central Sugar Board. Act No. 2479 of the Philippine Legislature created a central sugar board for the purpose of promoting and assisting in the establishment of sugar central in the Philippine Islands, and section 1 of the act provided as follows: "A central sugar board is hereby created, consisting of the Governor-General, the Speaker of the Philippine Assembly, or their authorized representatives, and three members appointed by the Governor- General with the consent of the Philippine Commission." Public Laws Enacted by the Philippine Legislature, vol. 10, p. 232.

The Public Welfare Board. Act No. 2510 of the Philippine Legislature created a public welfare board for the Philippine Islands, and section 3

thereof contained the following proviso: "The Public Welfare Board shall be comprised of the Secretary of Public Instruction who shall be *ex officio* chairman of the Board, the Secretary of the Interior, the Executive Secretary, the Director of Health, the Director of Education, the Director of Prisons, the dean of the College of Medicine and Surgery of the University of the Philippines, the chairman of the Committee of Public Health of the Philippine Assembly, and five additional members to be designated by the Governor-General. The appointive members of the Public Welfare Board shall hold office for a term of two years. In case of a vacancy, such vacancy shall be filled by designation by the Secretary of Public Instruction, and such appointee shall hold office for the unexpired term. All members of the Public Welfare Board shall be citizens of the Philippine Islands or of the United States, and residents of the Philippine Islands, and shall serve without compensation." Public Laws Enacted by the Philippine Legislature, vol. 10, p. 290.

The Coconut Products Board. Act No. 2598 of the Philippine Legislature established a coconut products board to encourage the improvement of coconut products, and provided for its membership as follows: "Section 1. A Coconut Products Board for the improvement of the coconut industry of the

Philippine Islands is hereby established, consisting of the Governor-General, the Speaker of the Philippine Assembly, or their authorized representatives, and one member appointed by the Governor-General, with the advice and consent of the Upper House of the Philippine Legislature." Public Laws Enacted by the Philippine Legislature, vol. 11, p. 220.

The Board on Textbooks. Act No. 2957 of the Philippine Legislature created a board of textbooks to have charge of the selection and approval of the textbooks to be used by the colleges and schools of the Government, and provided for the membership of the board as follows: the chairman of the Committee on Public Instruction of the Senate, the chairman of the Committee on Public Instruction of the House of Representatives, the President of the University of the Philippines, the Director of Education, and a member appointed by the Governor-General. Public Laws Enacted by the Philippine Legislature, vol. 16, p. 202.

The Irrigation Council. Act No. 3208 of the Philippine Legislature created an irrigation council consisting of the Secretary of Commerce and Communications, the Secretary of Agriculture and Natural Resources, the chairman of the Committee on Commerce and Communications of the Senate, the chairman of the Committee on Public Works of the

House of Representatives and one agriculturist appointed by the Governor-General. Public Laws Enacted by the Philippine Legislature, vol. 20, p. 54.

This course of federal and local legislation constitutes a contemporary interpretation of the highest order. It shows clearly what in the contemplation of Congress was within legislative competence, and in deciding what the Philippine Legislature might or might not do, we need not go behind the intention or the will of Congress. For in legislating for the Philippines, Congress is absolute and supreme, and is not subject to the same limitations which apply when it legislates for the United States. In enacting the Philippine Autonomy Act Congress was not bound to follow the principle of the separation of the powers of government. It could grant to the Philippine Legislature such powers as it deemed proper to grant independently of that principle.

(2) *The power to appropriate public funds for the purpose of buying stock in the company.* The stock of the Philippine Government in the National Coal Company was purchased out of public funds appropriated by the Philippine Legislature for that purpose. (Section 6 of Act No. 2705, as amended.) It is well-settled that the control, administration, and disposition of the property and funds of the

state are powers appertaining exclusively to the legislative department of the government. (Black's Constitutional Law, 3rd edition, p. 365.) And the right of the legislature to exercise its control over the administration and disposition of public funds through a committee or body created by it is generally recognized. Thus, in State v. McEwen, 24 Tenn. (5 Hump.) 241, it was held that:

> "The power of the legislature to control the public funds is supreme, and may be exercised by that body, or it may be delegated to a commission; and therefore the resolution adopted by the legislature in January, 1844, appointing commissioners to compromise and settle certain matters in controversy relating to the school fund, were constitutional."

Instances abound where legislatures had created committees or bodies to control the administration and disposition of public funds and property. In the case of the Philippine Legislature, a few of such instances may be found in the following enactments:

Act No. 2028 of the Philippine Legislature appropriated the sum of P2,000.00, and section 2 thereof provided for the administration and disposition of such funds, as follows: "A committee, to be composed of Jaime C. de Veyra, Epifanio de los Santos, Macario Adriatico, Pedro Ramirez, Manuel Artigas, José M. Romero Salas, and Hermenegildo Cruz,

is hereby created to arrange for the expenditure of the funds herein appropriated and to carry out the purposes of this Act." Public Laws Enacted by the Philippine Legislature, vol. 8, p. 114.

Act No. 2133 of the Philippine Legislature appropriated the sum of ₱30,000.00, and section 2 thereof provided for the administration and disposition of such funds, as follows: "The amount appropriated by this Act shall be expended in the discretion of a reception committee, composed of the President and six members of the Philippine Commission, to be appointed by the President of the Commission; the Speaker and six members of the Philippine Assembly, to be appointed by the Speaker of the Assembly; and seven private citizens of the Philippine Islands who shall be appointed by the Governor-General and who shall represent the Municipal Board of the City of Manila, the two Filipino political parties, the merchants and the press, which shall organize and take over its duties, without compensation of any sort for such services, as soon as the visit of such committee of the United States Congress is assured, and shall be authorized to adopt such resolutions as it may deem necessary or advisable for the proper reception and information of said congressional committee." Public Laws Enacted by the Philippine Legislature, vol. 8, p. 266.

Act No. 2795 of the Philippine Legislature appropriated the sum of ₱60,000.00, and section 1 thereof provided for the administration and disposition of such funds, as folows: "There is hereby appropriated, out of any funds in the Insular Treasury not otherwise appropriated, the sum of sixty thousand pesos, or so much thereof as may be necessary, to be expended, under the direction of a committee composed of the Honorable Manuel L. Quezon, President of the Senate and the Honorables Jaime C. de Veyra and Teodoro Yangco, Philippine Resident Commissioners in the United States, for the design, construction, and, in general, all the expenses approved by said committee for the planning and execution at Warsaw, Virginia, of a mausoleum dedicated to the memory of the late William Atkinson Jones, Representative for Virginia." Public Laws Enacted by the Philippine Legislature, vol. 14, p. 169.

(3) *The power to provide for voting by proxy on shares of stock in private corporations.* In voting the stock of the Philippine Government in the National Coal Company, the committee created by section 4 of Act No. 2705 merely acted as a proxy for the Government of the Philippine Islands which was the stockholder. And it is universally conceded that the right to vote by proxy in private corporations

must depend on express authority of statute or by-laws.

> "At common law there is no right to vote by proxy at a corporate election, but every vote must be personally given. To authorize a vote of this character it must be conferred by statute, charter, or by-law." (14 C. J., 907.)

> "The right of voting stock at corporate meetings is an incident of ownership, to be exercised, of course, in the mode and under the restrictions prescribed by the charter and by-laws, but nevertheless, a part of the stockholder's property, inherent in him by virtue of his title." (7 R. C. L., 344.)

In the case at bar, the charter of the National Coal Company expressly provided that the voting power of the stock of the Philippine Government in the said company shall be vested exclusively in a committee consisting of the Governor-General, the President of the Senate, and the Speaker of the House of Representatives.

IV

The Philippine Legislature has all general legislative power such as is exercised by States and Territories.

Section 8 of the Philippine Autonomy Act provides:

> "That general legislative power, except as otherwise herein provided, is hereby granted to the

Philippine legislature, authorized by this act."

The phrase "general legislative power" was inserted in this section on motion of Congressman Towner, formerly Chairman of the Committee on Insular Affairs of the House of Representatives. In explaining his motion, Mr. Towner remarked: "The language which I am asking to have introduced as a substitute is that which is usually given and approved in the formation of constitutions for States and Territories, when they desire to confer legislative power. In other words, it is now well established under American law what general legislative power is, *and this legislature ought to have all general legislative power such as is exercised by States and by Territories.*" (Italics ours.)

In supporting the motion of Mr. Towner, Congressman Mann, the Republican floor leader in the House of Representatives, said: "Mr. Chairman, I am in favor of the amendment offered by the gentleman from Iowa. * * * *I am in favor giving the Philippine Legislature broader power than we would give to a Territory of the United States.* What are we doing today? On one side we are trying to ascertain whether the Philippine people are competent for independence. Never in this world can you ascertain that by treating them like children. The only way that can be ascertained is to put respon-

sibility upon them and see whether they measure up to the responsibility. Now, as far as I am concerned, while I am not in favor of giving the Philippine Islands independence, separating them from the United States, *I am in favor of giving them control over their local affairs—exclusive control.* Of course we could change that law at any time. I am not in favor of letting the Philippine Government enter into foreign relations. I think the United States should stand for them in directing their foreign affairs, but I believe *they ought to have the right to govern themselves locally,* and you can not give them that right by putting a lot of restrictions in and saying they are not competent to do this, we are afraid they will do wrong about that, we will not trust them about some other things. We have got to trust them sooner or later. We have got to turn them loose as an independent people or else we have got to make them friends of ours if they remain under the jurisdiction of the Government of the United States, and the only way you can do so is to treat them like men. (Applause.) We do not own all the wisdom of the world ourselves. We sometimes doubt about our own capacity for self-government. I do not know whether they will have self-government without trials and tribulations, though I do not assume that

they will. We do not. We constantly have trouble amongst ourselves in the best and most enlightened parts of the United States. *Let the Philippine Government take their chance and see whether they can protect themselves in their own government*, and when that is determined it will be time enough for us to determine, first whether they want to be separated from the United States, which I do not think they will then want, and, second whether if they want it the United States feels at liberty to let them go." (Italics ours.)

In the course of his remarks, Mr. Mann was interrupted by Congressman Helm as follows:

> "Mr. HELM. If I understand the gentleman correctly, he wants to give them *the fullest measure of power in the matter of legislation?* (Italics ours.)
>
> "Mr. MANN. I do."

Congressman Miller, speaking also in favor of Mr. Towner's motion, said: "Now, Mr. Chairman, the language of the paragraph as it now stands, to my mind, is clearly improper. Just for a moment see what it does. All legislative powers are granted that heretofore have been granted, to what? To the Philippine Legislature—that is, the assembly—and to the Philippine Commission, and are hereby granted to the Philippine Government. That is,

this paragraph grants to the legislature of the islands which we are now creating only such power as heretofore has been granted to the assembly and to the commission, and that are also herein conferred upon the legislature, which is a complete restriction. As the gentleman from Illinois (Mr. Mann) has here clearly and emphatically stated, if we are to give these people anything like an opportunity to demonstrate their capacity for government, *we certainly must give them free rein, as far as possible, in matters of legislation.*

"Now, if we turn over the page, we find this language in section 12:

> "That all local legislative powers in the Philippines, except as herein otherwise provided, shall be vested in a legislature."

"There is very clearly a conflict between the two. The last does not go even as far as the first. It says 'all local legislative'. I say now, Mr. Chairman, when that paragraph is reached I propose to strike out the word 'local'. *I think the Philippine Legislature should not be tied to Congress constantly by an apron string. I think the people of the islands should have an opportunity to legislate.* Let them draw upon their experience, their knowledge of the affairs of their own people, and act accordingly. *We*

should let them have free and full opportunity to do so. But we have not done so in this paragraph. We have hedged them in, we have curbed them in, we have restricted their legislative activity to within very narrow limits." (Italics ours.)

Resident-Commissioner Quezon, in indorsing Mr. Towner's motion, made the following observations: "Mr. Chairman, I believe that the majority of the Insular Affairs Committee sympathize with the ideas expressed by the gentleman from Iowa (Mr. Towner) and the gentleman from Minnesota (Mr. Miller), although I am not authorized to speak for the majority. Therefore I hope that the amendment will be adopted. The language suggested by the gentleman from Iowa would serve to make it clear *that the purpose of this act is to grant the Philippine Legislature all the powers that usually are possessed by national legislative bodies, except those that are specifically prohibited by other sections of this act and those which affect foreign relations.* The amendment would serve to avoid constitutional questions that may arise if the section is left as it stands, as to whether or not the Philippine Legislature has any right to enact certain legislation." (Italics ours.)

Congressman Towner's motion was approved. (Congressional Record—House, pp. 16233-16235, October 6, 1914.)

We have quoted at length from the record of the Congressional debate on the Jones bill, in order to show beyond cavil the intention and purpose of Congress to grant to the Filipino people, through their legislature, "control over their local affairs—exclusive control" (Mann), "the right to govern themselves locally" (ibid.), "the fullest measure of power in matter of legislation" (Helm), "free rein as far as possible, in matters of legislation" (Miller).

Upon the proposition of giving to the Filipino people "the broadest liberty of self-government"—"the widest liberty of action in all their local affairs"—and of granting to the Philippine Legislature "all of the legitimate power of local self-government and self-taxation," there was a complete agreement—Republicans and Democrats were of the same opinion. This was again manifest from the general remarks made on the bill as a whole.

Congressman Mann said: "If we deal with the Filipino people rightly, they will want to stay here. I have heard debate here about whether the Filipinos are capable of self-government or incapable of self-government. I assume, for the purpose of argument at least that they are capable of self-government. *I am in favor of giving to the Filipino*

people the broadest liberty of self-government, retaining them under the American flag. (Applause on the Republican side.) The objection I have to the pending bill, in part, is that it has too many restrictions in it. If others do not offer amendments to remove those restrictions, I expect to offer a number of amendments to remove the restrictions upon the Philippine Legislature; and for this reason: *If we keep them, we ought to give them the widest liberty of action in all their local affairs.*" (Italics ours.) (Congressional Record—House, p. 16025, October 1, 1914.)

Congressman Jones, the author of the measure, said: "This bill does not express in its terms all that he may have desired and hoped for, but I am in a position to say that he accepts it as a *definite and decided advance in the direction of a more autonomous government* and of proximate and definite independence.

"It gives to his people a legislature of their own choosing in both of its branches; it removes the odious restriction upon the right of suffrage, which denies to the Filipino who can not read and write a foreign language all participation in the civil affairs of his country; *it enables the Filipinos to make their own laws and to raise and to expend the public*

revenues, and it provides for the early and thorough Filipinization of the civil service." (Italics ours.) (Congressional Record—House, p. 16080, October 2, 1914.)

Congressman Towner said: "Gentlemen differ with regard to the matter; each has his individual opinion. But there is this common ground upon which we can stand. *We all agree that we should give them the largest measure of self-government of which they are capable now and at all times.* A larger measure of self-government should be given to them now by this bill than they possessed under the old law." (Italics ours.) (Congressional Record—House, p. 16134, October 3, 1914.)

And, finally, Senator Hitchcock, as Chairman of the Senate Committee on Insular Possessions and Territories, said: "The restrictions upon the legislative powers of the Philippine Legislature in the past have been considerable, because of the fact that the president has the power to appoint the upper house. But under this legislation, upon which the Senate and the House have now practically reached an agreement, both houses will be composed of Filipinos elected by the people. They have power to pass all laws with relation to taxation; they have power to pass all laws with relation to appropriations; they have power to pass all laws concerning

the right of property with a few exceptions, which are ingrafted in the bill, just as Congress and our State legislatures are restrained by certain constitutional limitations.

"But while this act is virtually a constitution for the Philippine Islands and places a legitimate limit upon the power of the legislature, *it leaves to the Philippine Legislature virtually the power of local government.* It gives to the Philippine Senate the power to confirm appointments made by the Governor-General. It gives to the Philippine Legislature the power to say how high taxes shall be. It gives to the Philippine Legislature the power to say for what appropriations shall be. It gives to the Philippine Legislature the control over the municipalities of the Islands, the cities and the towns. It gives to the Philippine Legislature, with the approval of the President, the disposition of the public domain. *It gives to the Philippine Legislature, in short, all of the legitimate power of local self-government and self-taxation,* and it is in my opinion a measure wisely planned and carefully planned to increase beyond the point that has heretofore existed these powers of local self-government." (Italics ours.) (Congressional Record—Senate, Vol. 2, p. 12593, August 15, 1916.)

V

The grant of general legislative power to the Philippine Legislature included the authority to create certain offices and to designate the persons to fill such offices.

Even conceding, for the sake of argument, that membership of the committee created by section 4 of Act No. 2705 is an office within the purview of the Philippine Autonomy Act, it is respectfully submitted that the Philippine Legislature had authority to create such an office and to designate the person to fill it. This authority was included in the general legislative power granted to the Philippine Legislature by section 8 of the Philippine Autonomy Act which provides:

> "That general legislative power, except as otherwise herein provided, is hereby granted to the Philippine legislature, authorized by this act."

Congress was the source of all the powers of the Philippine Government, whether legislative, executive or judicial. In Binns v. United States, 194 U. S. 486, 48 L. ed. 1087, 1089, this Honorable Court said:

> "It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in

all the territories. x x x x It may legislate directly in respect to the local affairs of a territory, or transfer the power of such legislation to a legislature elected by the citizens of the territory."

In United States v. Bull, 15 Philippine 7, 29, the Supreme Court of the Philippine Islands said:

"The legislative power of the Government of the Philippines is granted in general terms subject to specific limitations. The general grant is not alone of power to legislate on certain subjects, but to exercise the legislative power subject to the restrictions stated. It is true that specific authority is conferred upon the Philippine Government relative to certain subjects of legislation, and that Congress has itself legislated upon certain other subjects. These, however, should be viewed simply as enactments on matters wherein Congress was fully informed and ready to act, and not as implying any restriction upon the local legislative authority in other matters."

The power to appoint or to elect all the officers of the Philippine Government resided originally in Congress. Instead of exercising this power directly, Congress had conferred part of it on the President who, under the Philippine Autonomy Act, has the power to appoint certain officers of the Philippine Government. A portion of the same power had also been conferred by Congress on the Governor-Gen-

eral. But the power of appointment so conferred on the Governor-General was limited by section 21 of the Philippine Autonomy Act to (a) such officers as might be appointed by the Governor-General at the time of the enactment of the Philippine Autonomy Act, (b) such officers as he was authorized by the Autonomy Act to appoint, and (c) such officers as he might be authorized by law to appoint. The power of appointment in respect to offices created after the enactment of the Philippine Autonomy Act had been conferred neither on the Governor-General, nor on the other executive officers of the Government, nor on the judicial officers. Appointments to such offices might be made only as authorized by the Philippine Legislature.

There can be no question that in the exercise of its legislative power Congress might pass a law creating a committee such as that created by section 4 of Act No. 2705. However, instead of legislating directly on all matters affecting the Philippines, Congress had seen fit to delegate to the Philippine Legislature its general legislative power in the premises, and by virtue of such delegation the Philippine Legislature might exercise all the legislative power of Congress over the Philippines, subject only to the limitations imposed by Congress itself.

The power of State legislatures to create offices and to appoint or to designate the persons to fill such offices when the appointing power is not exclusively vested by the Constitution in the executive department of the government is generally recognized.

> "In offices which are created by the legislature where the method of appointment is not prescribed by the constitution, the legislature may, according to the majority view, take on itself the responsibility of selecting the persons to be appointed and may name them directly in the statute creating the office, or it may by law create the office and provide that it shall be filled by election or by appointment by the legislature in joint session." 22 R. C. L., p. 426, and cases cited.

In Biggs v. McBride, 17 Or. 640, 5 L. R. A. 115, section 1, article 5, of the Oregon constitution provided: "The chief executive power of the State shall be vested in a governor," etc. It was claimed that this grant of executive power to the governor included the power to appoint the members of the board of railroad commissioners created by an act of the legislative assembly of the State of Oregon. In rejecting this contention, the Supreme Court of Oregon said:

> "It was not claimed at the argument that there is any express provision of the Constitution which

authorized the governor in direct terms to make the appointment in question, but that it is included in the grant contained in Sec. 1, art. 5, of the Constitution. That section declares: 'The chief executive power of the State shall be vested in a governor,' etc.

"Now, if it could be shown that the power to appoint all officers which are not expressly made elective by the people is a part of 'the chief executive power of the State,' the appellant's contention would be sustained; but no authority whatever has been cited to sustain this view, nor is it believed that any exists; on the contrary, the provisions of the fifth article of the Constitution, which relates to the executive department, all seem at variance with this view. The framers of this instrument evidently designed that no prerogative powers should be left lurking in any of its provisions. No doubt they remembered something of the history of the conflicts with prerogative in that country from which we inherited the common law. They therefore defined the powers of the chief executive of the State so clearly and distinctly that there ought to be no controversy concerning the method of filling the same, or, in some cases, of changing the method of filling an existing office."

VI

Act. No. 2705 of the Philippine Legislature has received the implied sanction of Congress.

Act No. 2705 of the Philippine Legislature was approved March 10, 1917. This act was presented to and signed by the Governor-General as prescribed in section 19 of the Philippine Autonomy Act. It had thus been in force for a number of years and acted upon by the executive officers of the Philippine Government, including the present Governor-General. By section 19 of the Philippine Autonomy Act all laws enacted by the Philippine Legislature are to be reported to Congress, which reserves power to annul them. Congress had not seen fit to annul Act No. 2705, notwithstanding that is was reported to it, and that the Wood-Forbes Report recommended "that Congress declare null and void legislation which has been enacted diminishing, limiting, or dividing the authority granted the Governor-General under Act No. 240 of the Sixty-fourth Congress, known as the Jones bill." (See Document No. 325, House of Representatives, Sixty-seventh Congress, Second Session.)

In Clinton v. Englebrocht, 13 Wall. 434, this Honorable Court said:

> "In the first place, we observe that the law has *received the implied sanction of Congress.* It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the territory

> to transmit to that body copies of laws on or before the first of the next December in each year. *The implied disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body.*" (Italics ours.)

In Ferries v. Vannier, 6 Dak. 186, 42 Pac. 31, the Supreme Court of Dakota said:

> "Congress has before it the laws of each session of our legislature containing those provisions, and the amendments made thereto from time to time, and it has neither disapproved nor modified them. They have, therefore, within the rule laid down by the Supreme Court of the United States, *received the implied sanction of Congress.*" (Italics ours)

In Baca v. Perez, 8 N. M. 187, 42 Pac. 162, the Supreme Court of New Mexico held that the provision that the acts of a territorial legislature be submitted to Congress and that, if disapproved by that body, they shall be of no effect, warranted the inference that when an act had been brought to the attention of Congress, and that body had suffered it to remain without disapproval for a series of years, it approved of the same. In the course of its decision, the court said:

> "It is fundamental that Congress, not rejecting territorial legislation, approves it—the corollary of the statute which requires the submission of the acts

of the legislature to Congress and declares that 'if disapproved they shall be null and of no effect.'

"If wrong, it has been permitted to pass current as law by competent and controlling authority, and must be accepted as *affirmative tantamount to congressional decree. Acquiescence by a party who might have repudiated is ratification.*" (Italics ours.)

In arguing the case for former Governor-General W. Cameron Forbes and his co-defendants, in Tiaco v. Forbes, 228 U. S. 549, 57 L. ed. 960, 963, Mr. Felix Frankfurter, then a law officer in the Bureau of Insular Affairs, and Mr. Justice George A. Malcolm, then an assistant attorney-general of the Philippine Islands, said: "To complement the significance of this reserve power of Congress, it is a sound rule of government that, in the absence of annulment or other action by Congress, an act of the Philippine Legislature, affecting its local affairs, after having been duly brought to congressional attention, will be presumed to have met with the approval of Congress (26 Ops. Atty. Gen. 91, 97, approvingly quoted in Gromer v. Standard Dredging Co., 224 U. S. 362, 371, 56 L. ed. 801, 805, 32 Sup. Ct. Rep. 499; United States v. Bull, 15 Philippine Rep. 31)." And in upholding the validity of the act of the Philippine Legislature involved in that

case, this Honorable Court, by Mr. Justice Holmes, pertinently observed:

> "By Sec. 86 of the act of July 1, 1902, all laws passed by the Philippine Government are to be reported to Congress, which reserves power to annul them. *It is worthy of mention that the law under consideration was reported to Congress and has not been annulled.*" (Italics ours.)

Adverting to the decision just cited, the Supreme Court of the Philippine Islands, in Chanco v. Imperial, 34 Philippine 329, 331, said:

> "The Supreme Court of the United States has held that the Philippine Legislature has the same powers in the Philippine Islands, within the sphere in which it may operate, as Congress itself (Tiaco v. Forbes, 228 U. S., 549); *and it has strongly intimated that when an act of the Philippine Legislature is reported to Congress and has not been annulled by that body it is a lawful and valid act.*" (Italics ours.)

In the recent case of Fajardo Sugar Co. of Porto Rico v. Holcomb, decided by the Circuit Court of Appeals for the First Circuit, November 23, 1926, the court said:

> "If, turning from the sections specifically dealing with the powers of the auditor, we look more broadly at the structure of the government of Porto Rico provided under the Organic Act,—we are driven to the same conclusion. Under that act,

the Governor, Attorney General, commissioner of education and auditor are presidential appointees. The Governor has, in general, the powers of the Governor of one of our states, and besides, he is required annually to make official report of the transactions of the government of Porto Rico to the executive department of the United States, to be designated by the President, and the said annual report shall be transmitted to Congress. Morever, in section 34 (Comp. St. par. 3803n), it is provided that if, after veto of the Governor, the Legislature shall by a two-thirds vote pass an act over the veto, the Governor, if he shall not then approve, shall transmit the proposed act to the President of the United States; that, 'if the President of the United States approve the same he shall sign it and it shall become a law. If he shall not approve same, he shall return it to the Governor so stating, and it shall not become a law.' It follows that no act can become law without the approval of the Porto Rican Governor, a presidential appointee, or of the President of the United States. There is also a provision in section 34 that:

> 'All laws enacted by the legislature of Porto Rico shall be reported to the Congress of the United States x x x x which hereby reserves the power and authority to annul the same.'

If not thus annulled, within reasonable time, there is a presumption that they are approved.

Tiaco v. Forbes, 228 U. S. 549, 558, 33 S. Ct. 585, 57 L. ed. 960; Porto Rico v. American, etc., R. R., 254 F. 369, 165 C. C. A. 589; Camunas v. P. R. Ry. (C. C. A.) 272 F. 924, 931 and cases cited.

The result is that all Porto Rican legislation now on the statute books is—in a very real sense, though indirectly,—the output of our federal government. Under such conditions, the court should not lightly assume that the tax acts of Porto Rico, now contended to be in conflict with section 20 of the Organic Act, are inconsistent and therefore invalid. Doubtless the relation of the Organic Act to the Porto Rican government is, in certain aspects, like the relation of a state Constitution to a state Legislature. Camunas v. P. R. Ry., etc., Co. (C. C. A.) 272 F. 924, 928.

But the analogy is not complete; for, after all, the Organic Act is nothing but federal legislation, and Porto Rican legislation, approved expressly or impliedly by Congress, has exactly the same import.

VII

The Governor-General had no authority to exercise solely the voting power of the stock of the Philippine Government in the National Coal Company.

Even if section 4 of Act No. 2705 were invalid in so far as it purported to vest the voting power of the stock of the Philippine Government in the National Coal Company exclusively in a committee consisting of the Governor-General, the President of the

Senate, and the Speaker of the House of Representatives, it is difficult to conceive how the Governor-General, could be held to possess the power so vested exclusively in the committee. The manifest intention of the Philippine Legislature in creating such committee was to avoid vesting in one man the stock-voting power of the Philippine Government. Upon what principle, therefore, could the Philippine Legislature be presumed to sanction precisely that which it had sought to avoid? It is well settled that where the enforcement of a part of a statute, after the elimination of unconstitutional portions, would produce results not contemplated or desired by the legislature, the entire statute should be held inoperative and void. As stated by Mr. Justice Malcolm in his leading work on "Philippine Constitutional Law," section 23:

> "The courts apply the well-established rule concerning partial invalidity. 'Where part of a statute is void as repugnant to the organic law while another part is valid, the valid portion, if separable from the invalid may stand and be enforced. But in order to do this, the valid portion must be so far independent of the invalid portion that it is fair to presume that the legislature would have enacted it by itself, if they had supposed that they could not constitutionally enact the other. Enough must remain to make a complete, intelligible, and valid statute, *which carries out the legis-*

> *lative intent.* The void provisions must be eliminated without causing results affecting the main purpose of the act, in a manner contrary to the intention of the legislature. The language used in the invalid part of a statute can have no legal force or efficacy for any purpose whatever, *and what remains must express the legislative will, independently of the void part, since the court has no power to legislate.*' " (Italics ours.)

CONCLUSION

Considered in the light of the authorities above set forth, it is respectfully submitted that the conclusion that section 4 of Act 2705, as amended, was invalid as in conflict with the provisions of the Philippine Autonomy Act was strained and far-fetched; and in view of the rule uniformly applied by the courts that an act of a co-ordinate branch of the government with reference to its constitutionality is to receive the benefit of every reasonable doubt, we maintain that such a conclusion should not prevail.

In McGuire v. Chicago, B. & Q. R. Co., 131 Iowa 340, 33 L. R. A. (N. S.) 706, 712, the court said:

> "While it is an imperative duty, from which no court will shrink, to declare void any statute the unconstitutionality of which is made apparent, due regard to the boundary between the legislative and judicial departments of our government requires that this prerogative be exercised with the greatest

> caution, and only after every reasonable presumption has been indulged in favor of the validity of the act. * * *
>
> "So thoroughly are the courts committed to this theory of the law that in Stewart v. Polk County, 30 Iowa, 9, 1 Am. Rep., 238, it is said that a legislative act may be declared unconstitutional only when it violates that instrument clearly, palpably, plainly and in such manner as to leave no reasonable doubt."

In Rubi v. Provincial Board of Mindoro, 39 Philippine 660, 719, the Supreme Court of the Philippine Islands said:

> "Most cautiously should the power of this court to overrule the judgment of the Philippine Legislature, a coordinate branch, be exercised. The whole tendency of the best considered cases is toward non-interference on the part of the courts whenever political ideas are the moving consideration."

If it be argued that our view of the case places great power in the hands of the presiding officers of the two Houses of the Philippine Legislature, the answer would be that the propriety, wisdom and expediency of legislation is exclusively a legislative question, and that the courts will not declare a statute invalid merely because in their judgment it may be unwise or detrimental to the best interests of the state.

On the other hand, if the decision under review were allowed to prevail, the same power would be

placed in the hands of only one man instead of three men, and the placing of immense power in the hands of one man is so contrary to the spirit and genius of American institutions that it could not have been conceived by Congress in the enactment of the Philippine Autonomy Act. "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere." (Savings and Loan Assoc. v. Topeka, 20 Wall. 662, 663, 22 L. ed. 461.) As stated by one of the greatest American lawyers and statesmen, Mr. Elihu Root: "If, whatever great officers of state happens to be the most forceful, skillful, and ambitious, is permitted to overrun and absorb to himself the power of all other officers and to control their action, there ensues that concentration of power which destroys the working of free institutions, enables the holder to continue himself in power, and leaves no opportunity to the people for a change except through a revolution. Numerous instances of this process are furnished by the history of some of the Spanish-American republics. It is of little consequence that the officer who usurps the power of others may design only to advance the public interest and to govern well. The system which permits an honest and well-meaning man to do this will afford equal opportunity for selfish ambition to usurp power in its own interest.

Unlimited official power concentrated in one person is despotism, and it is only by carefully observed and jealously maintained limitations upon the power of every public officer that the workings of free institutions can be continued." (E. Root, Addresses on Government and Citizenship, p. 103.)

This case presents another aspect which should not be overlooked. There is no question that the Governor-General could have vetoed Act No. 2705 if he thought that it encroached on his executive powers or functions. Instead of vetoing it, however, he suffered it to become a law by stamping his approval on it. Moreover, he acted upon it for over nine years (Act No. 2705 was approved on March 10, 1917) without questioning its validity. Under these circumstances, it seems but just and proper that he should not now be heard to complain on account of his failure to exercise his power to veto the act in question at the proper time.

But it may be objected that the incumbent of the office of Governor-General who challenged the validity of the act was not the same person who approved it. This is quite true, but the answer is simple. The whole theory of our system of government is that it is a government of laws and not of men. Accordingly, men may change, but our system of government does not change with them. The incumbents of an office may change but in le-

gal contemplation, the powers and duties of the office continue the same until changed by competent legislation.

No more edifying example can be cited than that shown by Chief Justice Marshall and his eminent associates in this Court when they were called upon to pass on the constitutionality of the circuit court act of 1802, which the great Chief Justice and some of his associates believed to be unconstitutional in so far as it required the performance of circuit court duty by supreme court judges. Absolutely laying aside personal and political considerations, they upheld the validity of the circuit court act, on the ground that as the original judiciary act of 1789 contained provision for circuit court duty, and as the supreme court judges (their predecessors in office) had performed such duty for a period of several years, such practice and acquiescence "affords an irresistible answer, and has fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken and controlled. Of course, the question is at rest and ought not to be disturbed." (Stuart v. Baird, 1 Cranch, 299.)

Writing to Judge Paterson before the decision in the above-mentioned case was rendered, the great

Chief Justice said: "This is a subject not to be lightly resolved on. The consequences of refusing to carry the law into effect may be very serious. For myself, personally, I disregard them; and so, I am persuaded, does every other gentleman on the Bench when put in competition with what he thinks his duty, but the conviction of duty ought to be very strong before the measure is resolved on. The law having been once executed will detract very much, in the public estimation from the merit or opinion of the sincerity of a determination not now to act under it."

Commenting on this brilliant episode, Charles Warren, in his celebrated work on the Supreme Court in United States History, says: "No more striking example of the non-partisanship of the American Judiciary can be found than this decision by a Court composed wholly of Federalists, upholding, contrary to its personal and political views, a detested Republican measure; and the case well justified the comment made by William Rawle in his *View of the Constitution* in 1825, that it illustrated the fortunate truth that in this Republic 'party taint seldom contaminates judicial functions.' It is interesting to note that the decision evoked from the most politically hostile papers of the day warm commendation of Marshall for 'this one